87-1541

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DON H. MAJOR, Administrator of the Estate of Debra Lynn Spradlin, deceased and CHARLES L. MAUK - - - - Petitioners

versus

UNITED STATES OF AMERICA - - Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950) bar the Petitioners' claims in this case?

2. Is the *Feres* doctrine unworkable in its present configuration and application?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the court whose judgment is sought to be reviewed are named in the caption of this Petition as filed in this Court.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Authorities	v
Opinions Below	1– 2
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	2– 7
Basis for Original Federal Jurisdiction	7
Summary of Argument	8
Argument; Reasons for Granting the Writ	8–17
Conclusion	17
Certificate of Service	18
Appendix	1a–35a
Opinion filed December 16, 1987 in the United States Court of Appeals for the Sixth Circuit	1a– 9a
Memorandum Opinion and Order Entered October 27, 1986 in the United States District Court for the Western District of Kentucky	10a–13a
Complaint Filed in the United States District Court for the Western District of Kentucky, *Don H. Major, Administrator of the Estate of Debra Lynn Spradlin, deceased* v. *United States of America*, No. C86-0116-L(B)	14a–22a
Complaint Filed in the United States District Court for the Southern District of Indiana, *Charles L. Mauk* v. *United States of America*, No. NA86-42-C	23a–31a

PAGE

Full Text of Statutes Involved:

Title 28, United States Code, Section 1346(b) . . 31a
Title 28, United States Code, Section 2671 . . . . 31a–32a
Title 28, United States Code, Section 2674 . . . . 32a
Title 28, United States Code, Section 2679 . . . . 32a–34a
Title 28, United States Code, Section 2680 . . . . 34a–35a

TABLE OF AUTHORITIES

Cases: PAGE

Chappel v. *Wallace*, 462 U.S. 296 (1983) 9

Del Rio v. *United States* [11th Circ., 1987] 833 F. 2d 282 10

Drake Towing Co., Inc. v. *Meisner Marine Construction Co.* [11th Circ., 1985] 765 F. 2d 1060 12

Feres v. *United States*, 340 U.S. 135 (1950) 4, 8

Major v. *United States* [6th Circ., 1987] 835 F. 2d 641 ..... 3, 12–13

Radovich v. *National Football League*, 352 U.S. 445 (1957) 6

Scheuer v. *Rhodes*, 416 U.S. 232 6

Swartz v. *Eberly* [D.C. Pa., 1962] 212 F. Supp. 32.. 12

United States v. *Johnson*, ____ U.S. ____, 95 L. Ed. 2d 648 (1987) 9, 13, 16

United States v. *Shearer*, 473 U.S. ____, 87 L. Ed. 2d 38 (1985) 4, 8

United States v. *Stanley*, ____ U.S. ____, 97 L. Ed. 2d 550 (1987) 9

Statutes:

28 U.S.C. §2671 2

28 U.S.C. §2680 ..... 2, 12

28 U.S.C. §2680(a) 12

28 U.S.C. §2680(h) 11

28 U.S.C. §2680(j) 10

Miscellaneous:

FRCivP 12(b)(1) and (6) 3

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v.

UNITED STATES OF AMERICA - - *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on December 16, 1987.

OPINIONS BELOW

The December 16, 1987 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 835 F. 2d 641 and is reprinted in

the Appendix to this Petition, pp. 1a-9a. The prior memorandum opinion and order of the United States District Court for the Western District of Kentucky entered October 27, 1986 is unreported and is reprinted in the Appendix to this Petition, pp. 10a-13a.

JURISDICTION

The judgment of the Court of Appeals was entered December 16, 1987. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the "Federal Tort Claims Act", Title 28, United States Code, Sections 1346(b), 2671, 2674, 2679, and 2680. The verbatim text of these statutes is set forth in full in the Appendix to this Petition, pp. 31a-35a.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from an Order and Judgment entered in the United States District Court for the Western District of Kentucky dismissing consolidated complaints filed against the United States under the Federal Tort Claims Act, 28 U.S.C. §2671 et seq. [hereafter the "FTCA"], on the grounds that the Court lacked subject matter jurisdiction, and that the complaints failed to state a claim upon which relief could be granted against the Government.

The Circuit Court of Appeals affirmed the District Court dismissal, *Major* v. *United States* [6th Circ., 1987] 835 F. 2d 641.

The Plaintiffs in the District Court, Petitioners here, are Don H. Major, Administrator of the Estate of Debra Lynn Spradlin, deceased, and Charles L. Mauk, in his own right. Both Spradlin and Mauk were enlisted members of the United States Army, stationed at Fort Campbell, Kentucky, at the time of an accident, March 17, 1983, which occurred on the Fort Campbell Military Reservation, and which resulted in the death of Spradlin and serious injury to Mauk. The accident was caused when an Army non-commissioned officer, William B. Lane, ran his vehicle off a public road located within the Base and struck Mauk's motorcycle with Mauk and Spradlin sitting on it. At the time, the motorcycle was stopped and parked well off the roadway. Lane had become extremely intoxicated and impaired at an on-base "party" held in his Company barracks in violation of existing Army, Defense Department, and Presidential Rules, Regulations, and Directives.[1]

The Government moved to dismiss pursuant to FRCivP 12(b)(1) and (6), on the grounds that the District Court lacked subject matter jurisdiction and that the Complaints failed to state a claim against the Government upon which relief could be granted. Spe-

[1]These facts are established by the Complaints, see pp. 15a-19a, 24a-28a, below, and were found by the District Court to be essentially undisputed; see Memorandum Opinion of the District Court October 27, 1986, Appendix p.11a.

cifically, the Government argued that the claims asserted by Mauk and Spradlin were barred by reason of their status of members of the military under the doctrine of *Feres* v. *United States,* 340 U.S. 135 (1950) and *United States* v. *Shearer,* 473 U.S. ——, 87 L. Ed. 2d 38 (1985).

The Government also argued in its Motion the additional circumstance that the accident which killed Spradlin and injured Mauk occurred on the Fort Campbell, Kentucky Military Reservation and that at the time of the accident Mauk and Spradlin were under such a degree of military control as to bar recovery under *Feres* v. *United States, supra.*

Major[2] and Mauk argued in the District Court, and in the Circuit Court of Appeals, that nothing in the so-called *Feres* doctrine acts to bar the principal cause of action asserted in the consolidated complaints, and that the Government's interpretation of *United States* v. *Shearer, supra,* carried that case far beyond any reasonable application to the complaints in this case.

The District Court sustained the Government's Motion and dismissed the consolidated complaints. In its Memorandum Opinion dismissing the complaints, the Court professed an inability to distinguish the cause of action alleged in the consolidated complaints from the circumstances presented in *United States* v. *Shearer, supra,* in that this case would require the District Court to litigate military command decisions relating to the discipline and control of military personnel in-

[2]As Administrator on behalf of the decedent Spradlin.

volved in the series of incidents which led to the death of Spradlin and serious injury to Mauk.

In its Opinion affirming the District Court,[3] the Court of Appeals—citing *Shearer*—held that it could find no "supportable basis" for reaching a conclusion that Petitioners' claims would not impermissibly implicate "basic choices about the discipline, supervision, and control of servicemen"; 835 F. 2d 641.

B. The Consolidated Complaints Filed in the District Court.

The substantive allegations of the two complaints which were consolidated in this action are essentially identical, except for the circumstance that Petitioner's decedent Spradlin was killed in the accident March 17, 1983 and Petitioner Charles L. ("Lance") Mauk was seriously and permanently injured.[4]

At the time of the accident, both Mauk and Spradlin were active duty U. S. Army personnel, assigned to a Unit of the 101st Airborne Division at Fort Campbell,

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[3]Reported at 835 F. 2d 641 [6th Circ., 1987]; and included in the Appendix to this Petition, pp. 1a-9a.

[4]Further references to "the complaint" will incorporate similar allegations in both complaints. Specific references will be to numbered paragraphs in the senior action filed in the District Court, *Major, Administrator* v. *United States*, No. C86-0116-L(B), Appendix pp. 14a-22a. The similar complaint in *Mauk* v. *United States*, No. C86-0363-L(B) is found at Appendix pp. 23a-31a. Because of venue requirements, the *Mauk* complaint was originally filed in the United States District Court for the Southern District of Indiana at New Albany, then transferred to the Western District of Kentucky at Louisville and consolidated with the *Major* complaint.

Kentucky. The accident occurred at approximately 10:20 on an inclement night on a road within the Fort Campbell Military Reservation which has the "character of a public highway."

Mauk and Spradlin were sitting on Mauk's motorcycle stopped well off the roadway, when it was struck by a vehicle being operated by Lane, another member of the 101st Division.

Lane had gotten himself intoxicated to the point of disability at a "party" in a military barracks, also on the Fort Campbell Military Reservation, where large quantities of intoxicating beverages had been purchased and distributed at the direction or with the knowledge of supervisory personnel, and in violation of existing, valid regulations promulgated not only by the Army, but by civilian authorities—the Secretary of the Army, the Secretary of Defense, and the President.[5]

The complaint alleges that these valid regulations prohibited "the availability, provision, and consumption of alcoholic intoxicating beverages" under the circumstances detailed in the complaint, and that employees of the United States flagrantly violated these regulations, or in the alternative, negligently implemented and administered the same.[6]

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[5]See complaint, ¶¶7, 8, 19, Appendix pp. 15a-16a, 19a.

[6]See complaint, ¶8, Appendix pp. 15a-16a, and ¶¶16, 17, 18, and 19, Appendix pp. 17a-19a. These allegations are central to the complaint, and are to be taken as true for purposes of this appeal; see *Scheuer* v. *Rhodes*, 416 U.S. 232, 236; and *Radovich* v. *National Football League*, 352 U.S. 445 (1957).

Finally, the complaint alleges that at the time of the accident, the Plaintiffs were not engaged in any activity connected with their military status or service, that they were not taking advantage of privilege or benefit incident to military service, and that their activities were not of a character which would impact the integrity of military discipline if litigated through the judicial process.[7]

BASIS FOR ORIGINAL FEDERAL JURISDICTION

Separate claims on behalf of Petitioner Major and Petitioner Mauk were filed with the appropriate Federal agency, the Department of the Army, and were finally denied by the agency in writing August 14, 1985. Suit was commenced by the Petitioner Major February 7, 1986 in the United States District Court for the Western District of Kentucky. Suit was commenced by the Petitioner Mauk in the United States District Court for the Southern District of Indiana February 11, 1986.[8] Petitioners' administrative claims, and the civil actions filed by Petitioners, were commenced within the requisite time periods set forth under Title 28, United States Code, Section 2401(b). The basis for federal jurisdiction in the referenced United States District Courts, the Courts of first instance in this case, was Title 28, United States Code, Section 1346 (b).

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[7]See complaint, ¶¶24, 25, and 26, Appendix p. 20a.

[8]This latter action was later transferred to the United States District Court for the Western District of Kentucky, and consolidated with the Civil Action filed by the Petitioner Major; see n. 4, *ante*.

SUMMARY OF ARGUMENT

The District Court and the Court of Appeals erred in holding the so-called *Feres* doctrine applicable to the well-pleaded facts set forth in Petitioners' consolidated complaints, so as to require dismissal on the grounds of lack of subject-matter jurisdiction.

In addition or in the alternative, the facts of this case illustrate the illogical results increasingly produced by *Feres* and its progeny; and that *Feres* has become an unworkable artifice.

The *Feres* doctrine, at least as applied to the facts of this case, is totally without basis in any express exception under the Federal Tort Claims Act, nor can its application be reasonably inferred as involving Congressional intent.

Application of the *Feres* doctrine under these circumstances has prompted the District Court and the Court of Appeals to an unfair and unwarranted denial of Petitioners' remedies under the Federal Tort Claims Act.

ARGUMENT; REASONS FOR GRANTING THE WRIT

In dismissing the consolidated complaints the District Court relied on *United States* v. *Shearer,* 473 U.S. ——, 87 L. Ed. 2d 38 (1985). That case applied the *Feres* doctrine to bar the Federal Tort Claim of the mother of a serviceman who had been kidnapped and murdered by another serviceman while off duty and away from his base.

The District Court's Memorandum Opinion focused almost entirely on that aspect of *Shearer* holding that

claims which by their nature would intrude on the military disciplinary or command structure, are barred.

The Court of Appeals reinforced that aspect of the District Court Opinion, applying not only *Shearer* but three other cases, *Chappel* v. *Wallace,* 462 U.S. (1983), *United States* v. *Stanley,* —— U.S. ——, 97 L. Ed. 2d 550 (1987) and *United States* v. *Johnson,* —— U.S. ——, 95 L. Ed. 2d 648 (1987)[9] as establishing an absolute bar to a claim which could arguably touch upon the military command/discipline process.

In fact, in applying these cases to affirm the District Court dismissal of Petitioners' complaints, the Court of Appeals discerned the intent and policy of this Court to involve a sweeping repeal of the FTCA as to *any* serviceperson in *any* situation:

> Review of these [cited] Supreme Court precedents makes it clear that in recent years the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tort feasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose. [835 F. 2d 644-645; emphasis in original]

The problem with this kind of fixation on result-oriented analysis is that it glosses over—and illogically

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[9]Two of these cases, *Johnson* and *Stanley* were both decided after briefing and argument in this case was concluded in the Court of Appeals.

so—numerous distinguishing factors, in this individual case, which would either preclude or militate against application of the *Feres* bar.

Further, and most importantly, the obvious struggle engaged in by the Courts below to stretch the essentially ephemeral rationale of *Feres* and its progeny, quite emphatically illustrates that the time has come to totally disassemble this entire patchwork construction, repeal *Feres,* and go back to the fundamental, and explicit, "combatant activities" exclusion of the FTCA, 28 U.S.C. 2680(j); then to *reconstruct* the logical dimensions of congressional intent in order to extract this Court, and all the lower Courts, from the kinds of convolutions that Feres has spawned.[10]

To illustrate: the Court's Opinion in *Shearer* makes it amply clear that the decision was grounded primarily in what the Court perceived to be an attempt by that plaintiff to circumvent a statutory exclusion under the FTCA, in that the Plaintiff alleged *consequential conduct* on the part of the Government and its agents

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[10]See especially *Del Rio* v. *United States* [11th Circ., 1987] 833 F. 2d 282. In *Del Rio*, a female Navy Petty Officer sought damages under the FTCA in connection with the treatment of her pregnancy, and delivery, at a Naval Hospital which left her injured, one twin son dead, and the other twin son seriously impaired. The District Court dismissed the complaint under *Feres*. The Circuit Court of Appeals, affirming in part and reversing in part, held (1) that the Plaintiff Petty Officer's claims were barred under the *Feres* doctrine, (2) that her claims as *guardian* of her *injured* son were *not* precluded, but that (3) her claims as *personal representative* of her *deceased* son *were* barred.

relating to negligence in facilitating the death of plaintiff's decedent.[11]

The *Shearer* opinion went on to hold that the situs of the murder or even the fact that the victim was a member of the active military, was not decisive, but the more important criteria were:

> Whether the suit requires a civilian court to second guess military decisions . . . and whether the suit might impair essential military discipline." [87 L. Ed. 2d at p. 44; citations omitted]

The *Shearer* Court denounced the complaint in that case as ". . . [striking] at the core of these concerns" where that complaint alleged that Army personnel "negligently and carelessly failed to exert a reasonably sufficient control over [the murderer] Andrew Heard, . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to remove [him] from active military duty."[12]

The Court held squarely that this kind of allegation ". . . goes directly to the 'management' of the military; . . . and calls into question basic choices about the discipline, supervision, and control of a servicemen."[13]

Other than an alternative, collateral allegation relating to negligent supervision, there are no such alle-

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[11]The specific exclusion is 28 U.S.C. 2680(h) which precludes ". . . any claim arising out of assault or battery." Plaintiff's decedent in the *Shearer* case was murdered, an intentional battery.

[12]87 L. Ed. 2d at pp. 44.

[13]Ibidem.

gations in the consolidated complaints in this action.[14] The primary and operative allegations in the consolidated complaints here, are grounded squarely in the total failure of designated employees of the United States to follow valid, existing regulations relating to the provision and consumption of alcoholic beverages.[15]

Generally, there can be no doubt that *negligent failure* to implement existing valid regulations or policies is actionable under the Federal Tort Claims Act; see e.g. *Drake Towing Co., Inc.* v. *Meisner Marine Construction Co.* [11th Circ., 1985] 765 F. 2d 1060.[16]

Once the threshold question is addressed—how the Petitioner's *status* relates, if at all, to the nature of the incident giving rise to the claim,[17] the next level of inquiry is to consider the impact of the case on the military disciplinary/management system; *Major* v. *United*

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[14]Appendix p. 18a. Petitioners concede that these collateral allegations as to negligent supervision, standing alone, would be questionable.

[15]Likewise, *none* of the statutory exclusions under the Federal Tort Claims Act, 28 U.S.C. 2680, are implicated in the specific conduct alleged in the consolidated complaints in this case.

[16]This doctrine is operative as against the "discretionary function" exemption under the FTCA, 28 U.S.C. §2680(a) which in turn is quite similar, in theory and in application, to the *Feres/Shearer* bar to suits implicating military supervision or discipline. Petitioners are unaware of any case which would invalidate this clear analogy.

[17]Although the Courts below accorded little weight to the "status" issue, this threshold aspect turns substantially on a factual determination, which facts Major and Mauk had no opportunity to establish, thus arguably precluding summary dismissal at the pleadings stage of the case; *Swartz* v. *Eberly* [D.C. Pa., 1962] 212 F. Supp. 32.

States, supra, 835 F. 2d 644-45; and *United States* v. *Johnson, supra,* 95 L. Ed. 2d 654-655 and *passim.*

The fundamental question is whether the maintenance of this action will require the Court ". . . to second-guess military decisions," or "whether the suit might impair essential military discipline."[18]

The Petitioners argued in the Court of Appeals that the Opinion of the District Court articulates a very superficial construction of *Shearer,* and appears to gloss over the critical holding in *Shearer* that ". . . the *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the *statute itself* as it has been construed in *Feres* and subsequent cases.[19]

While apparently sympathetic to this contention, the Court of Appeals nevertheless found itself bound by its perception of the extremely broad scope of *Feres.*

The Petitioners further argued that even under *Shearer,* it is apparent that the District Court would *not* have been required to "second-guess military decisions" in any manner peculiar to the status of the Petitioners. The military decision-making process is in no way implicated in this case. Any relevant "decision" was made when the indicated Army and Defense Department authorities promulgated regulations dealing with the dispensing and consumption of alcoholic beverages. The fact that these regulations and

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[18]*Shearer, supra,* at 87 L. Ed. 2d 38, at p. 44; *Major,* ibid; *Johnson,* ibid.

[19]87 L. Ed. 2d at p. 44.

policies were violated, or ignored, resulting in harm to the Plaintiffs in these actions, cannot seriously be characterized as a "military decision" somehow immune from accountability.

Petitioners urged upon the Court of Appeals the obvious premise that the *only* question presented for litigation is whether or not the Plaintiffs can offer proof sufficient to establish a causal link or nexus between the violation of these existing valid regulations or policies, and the harm to the Plaintiffs, which is of course a factual determination, and not for a Rule 12 Motion.

As to whether the prosecution of this case ". . . might impair essential military discipline," the Petitioners argued that the Army member who actually struck Mauk and Spradlin has already been disciplined, thus there can be no implication of any Army command personnel being put on the witness stand to explain ". . . whether [the Army overlooked] a particular incident or episode."[20]

As noted,[21] there is no classic "discretion" at issue here. Clear, pervasive regulations were in existence

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[20] *Shearer* v. *United States, supra,* at 87 L. Ed. 2d 45. Further, insofar as an apparently crucial determination involves the extent to which the Plaintiff was subject to military control at the time of the accident, it should be kept in mind, again, that the complaint has not implicated any action or matter on the part of the United States Army involving a legitimate military mission or activity. What is alleged and is at issue, is the conduct of an apparently unauthorized drinking party in direct violation of valid, existing Army and Defense Department regulations, which led directly to the death of Spradlin and the injuries to Mauk.

[21] Ante, n. 15.

prohibiting the conduct which proximately harmed Petitioners. Those regulations were clearly and flagrantly violated. Thus, the factual context of this case, unlike *Johnson* v. *United States, supra,* presents neither necessity nor opportunity for Petitioners to question any "decision" of the Army officials. Petitioners' proofs need consist of only (1) the existence of the referenced regulations; (2) that an incident occurred in violation of those regulations; (3) that the incident resulted in Lane's intoxication; and (4) that Lane's intoxication was the proximate cause of injury to Petitioner Mauk and death to Petitioner's decedent Spradlin.

In contrast, as the majority opinion in *Johnson* v. *United States, supra,* implies,[22] the Plaintiffs proofs would of necessity involve an inquiry as to *which* vector or direction the FAA controller *should have* given Lieutenant Commander Johnson; or whether the controllers' actions arguably encompassed permissible professional discretion or judgments; in short, not at all like the elements of the complaints filed by the Petitioners here.

It is undisputed that at the time he struck Spradlin and Mauk, Lane was a walking [or rolling] bomb—an "accident looking for a place to happen." Further, the area of the Base where Lane inevitably struck someone—Spradlin and Mauk—was ". . . routinely used by . . . non-military personnel . . .".[23]

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[22]95 L. Ed. 2d 658-659.

[23]Complaint, ¶22, Appendix, p. 20a.

Thus, Lane could very well have struck—and injured or killed—a *non-military* person, in the same area of the Base, or off Base for that matter. Had he done so, there is simply no question that such a person would have an actionable claim against the United States under the FTCA.[24]

This paradigm also illustrates the essential unfairness and illogicality of the results produced by the type of rigid analysis applied by the Court of Appeals in this case.[25] It also underscores the virtual impossibility of manipulating any conceivable *Feres*-type rationale to achieve even minimal consistency or fairness.

Worse, it is tacitly acknowledged that there is simply no statutory authority, nor any evidence of congressional intent to support this kind of jurisprudential roulette which, it is respectfully suggested, would never be permitted under any other type of remedial statute.

Finally, and in the same vein, Petitioners find no statutory support whatsoever for the premise, however it may have evolved into a collateral consideration, that the existence of military "no-fault" benefits creates yet another reason to deny Petitioners any remedy under the FTCA.

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[24]In which the same kind of inquiries would inevitably be made as to the enforcement—or lack thereof—of Army, DOD, and Presidential Regulations relating to the provision and use of alcohol.

[25]Which is eloquently addressed in the separate Opinion of Justice Scalia in *United States* v. *Johnson*, 95 L. Ed. 2d 659ff, and will not be restated here.

Why would it not be as logical, or even more logical, to establish a rule (widely-applied to personal injury damage recoveries), that VBA or other benefits be *repaid* from the proceeds, if any, of a broader cause of action?

The answer is, of course, that one premise is no more nor less logical when viewed in the context of the underlying statute, or from any demonstrable congressional intent.

CONCLUSION

For all the reasons, and upon the authorities cited and argued in this, their Petition, the Petitioners respectfully pray that a Writ of Certiorari be granted.

March 14, 1988

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CERTIFICATE OF SERVICE

I, William T. Warner, a member of the Bar of this Court, representing the Petitioners herein, hereby certify that I have, this 14th day of March, 1988, served the foregoing Petition for Writ of Certiorari pursuant to Rules 28.3 and 28.4 of this Court upon all parties required to be served, to wit: The Honorable James H. Barr, Assistant U. S. Attorney for the Western District of Kentucky, Captain Melvin G. Olmscheid, Office of the Judge Advocate General, United States Army, and the Solicitor General of the United States, by depositing three (3) copies of the said Petition in a United States mailbox, with first-class postage prepaid, addressed to The Honorable James H. Barr, Assistant U. S. Attorney, 510 West Broadway, Louisville, Kentucky 40202; to Captain Melvin G. Olmscheid, Department of the Army, Office of the Judge Advocate General, Washington DC 20310-2200; and to the Solicitor General of the United States, Department of Justice, Washington, DC 20530.

William T. Warner

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
SEE, SIXTH CIRCUIT RULE 24

No. 86-6226

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DON H. MAJOR, administrator of the estate of Debra Lynn Spradlin, deceased, and CHARLES L. MAUK, - - - - *Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA, - - *Defendant-Appellee.*

On Appeal From the United States District Court for the Western District of Kentucky.

Decided and Filed December 16, 1987

Before: WELLFORD and GUY, Circuit Judges; and HIGGINS, District Judge.*

PER CURIAM. Plaintiffs, Don Major, as administrator of the estate of Debra Spradlin, and Charles Mauk, appeal from the district court's order dismissing their consolidated complaints for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Both Spradlin and Mauk were enlisted members of the United States Army and had brought suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671, *et seq.*, for the death of

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*Honorable Thomas A. Higgins, United States District Court, Middle District of Tennessee, sitting by designation.

Spradlin and injuries suffered by Mauk when they were involved in an accident on their military base in Fort Campbell, Kentucky. The trial court's dismissal was predicated on its conclusion that such suits are barred by the *Feres* doctrine, *Feres v. United States*, 340 U.S. 135 (1950), which precludes recovery under the FTCA for injuries sustained by military personnel that arise from activity "incident to service." *Id.* at 146. We agree and affirm.

I.

The facts relative to this appeal are simple and uncontested. At approximately 10:30 p.m. on the evening of March 17, 1983, Spradlin and Mauk were sitting on Mauk's motorcycle, which was stopped well off one of the roads within the Fort Campbell Military Reservation. An Army non-commissioned officer, William Lane, ran his vehicle off the road and struck the motorcycle, killing Spradlin and severely injuring Mauk. Lane had become intoxicated and his driving impaired at an on-base party held in his company barracks and attended by several others, including some of his superiors. While not actually on duty at the time of the accident, both Spradlin and Mauk were on active duty status and neither were on a pass or furlough.

II.

Our result in this case is reached by an analysis of a series of Supreme Court precedents both leading up to the adoption of the *Feres* doctrine and subsequently giving that doctrine form and substance. In *Brooks v. United States*, 337 U. S. 49 (1949), the Court was faced with a claim brought pursuant to the FTCA by members of the armed forces who were injured while on furlough in a collision with an Army truck. The Court held their claim to be within the ambit of the FTCA's conferral of juris-

diction over "*any* claim founded on negligence brought against the United States," stating "[w]e are not persuaded that 'any claim' means 'any claim but that of servicemen.' " *Id.* at 51. The Court gave short shrift to the government's protestations of "dire consequences" for the military which would allegedly result from a finding that plaintiffs' injuries were incident to their military service. In reaching this conclusion, the Court reasoned that "we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired." *Id.* at 52. However, the Court also observed that "[w]ere the accident incident to the Brooks' service, a wholly different case would be presented." *Id.*

One year later, that "wholly different case" arrived in *Feres*.. Although *Feres* was comprised of three consolidated cases, the facts in the Feres case itself are most illustrative of the Court's new position on the availability of relief for military personnel under the FTCA. Feres was killed by fire in his barracks while on active duty status. His executor alleged negligence in quartering him in barracks which were known, or should have been known, to be unsafe. The Court in *Feres* gave a much narrower construction to the FTCA's waiver of sovereign immunity with respect to the military in general and, significantly, it also eschewed any attempt to engage in an individualized interpretation of what constituted an "injury incident to service." Rather, the Court automatically equated events occurring while an employee was on "active duty" with those "incident to the service," thereby effectively barring all claims for injuries taking place while one is on active duty. 340 U. S. at 138.

In the past five years, the Supreme Court has decided four cases under the *Feres* doctrine and in each case it reversed a finding of federal jurisdiction by the court of

appeals. *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, — U.S. —, 107 S. Ct. 3054 (1987), both involved attempts to bring direct claims for violation of constitutional rights pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Chappell*, a class of black enlistees sued their military superiors for racial discrimination in making duty assignments, giving performance evaluations, and imposing penalties. In barring damage suits by military personnel for constitutional violations, the Court emphasized that "[t]he special nature of military life — the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel — would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." 462 U.S. at 304. The Court also relied on Congress' constitutionally created authority over the military in concluding that special factors existed which counselled against the implication of a judically imposed *Bivens*-type remedy for military personnel. *Id.*

In *Stanley*, plaintiff sued the government after he learned that, while in the Army in the 1950's, he was secretly administered LSD as part of a program to test the effects of the drug on human subjects. 107 S. Ct. at 3057. He alleged that the drug had caused personality changes which resulted in his discharge and the dissolution of his marriage. Plaintiff's FTCA claim had previously been dismissed by the court of appeals, and he was barred by the Supreme Court from renewing that claim in the current proceedings. In addition, the court held that since plaintiff's *Bivens* claim was subject to the constraints of *Feres*, as established by the Court's decision in *Chappell*, it was also barred provided his injury was incurred "incident to service." The Court ruled that Stanley was precluded from contesting the relationship between his injury and his

military status because the court of appeals had already decided this issue by virtue of its earlier dismissal of his FTCA cause of action. In opting for the relatively bright-line "incident to service" test of *Feres* for use in *Bivens* actions as well, Justice Scalia, writing for the majority, pointed out that:

> [a] test for liability that depends on the extent to which particular suits would call into question military discipline and decision-making would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions . . . the mere process of arriving at correct conclusions would disrupt the military regime.

107 S. Ct. at 3063.

United States v. Shearer, 473 U.S. 52 (1985), and *United States v. Johnson*, 107 S. Ct. 2063 (1987), both involved attempted suits under the FTCA by military personnel. In *Shearer*, plaintiff's decedent was an Army private who was kidnapped and murdered by another serviceman while off duty and away from the base. Plaintiff alleged that Army negligence had caused her son's death. In reversing the court of appeals' conclusion that "an off-duty serviceman not on the military base and not engaged in military activity at the time of injury, can recover under FTCA," *Shearer*, 723 F.2d 1102, 1106 (3d Cir. 1983), the Court found the relevant inquiry to be not the situs of the act or incident but "whether the suit requires the civilian court to second-guess military decisions, and whether the suit

might impair essential military discipline." 473 U.S. at 57 (citations omitted). The Court concluded that an impermissible level of civilian judicial involvement would result if this type of case were permitted, since commanding officers would likely have to testify about their practices and policies in disciplining subordinates and dictating their off-base conduct. *Id.* at 58.

In *Johnson*, plaintiff's husband was killed in a helicopter crash during a rescue mission due to the alleged negligence of an air traffic controller employed by the Federal Aviation Administration (FAA). The Court once again reversed the court of appeals by applying the *Feres* doctrine, even though the alleged negligence did not involve any military personnel. In the same way it held that the *situs* of the incident was not determinative in *Shearer*, the Court found that the *status* of the tortfeasor as a civilian governmental employee was similarly insignificant. Since the accident had occurred while the pilot was engaged in a service-related mission, suit was barred because its maintenance would "necessarily implicate[] the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." 107 S. Ct. at 2069.[1]

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[1]Interestingly, Justice Scalia, who authored the Court's opinion in *Stanley*, dissented in *Johnson*. He explained his rationale for this seeming inconsistency as follows:

> Today, no more than when we wrote *Chappell*, do we see any reason why our judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits, where we adopted an "incident to service" rule. In fact, if anything we might have felt more free to compromise military concerns in the latter context, since we were confronted with an explicit congressional authorization for judicial involvement that was, on its face, unqualified; whereas here we are confronted with an explicit

(Footnote Continued on Next Page)

III.

Review of these Supreme Court precedents makes it clear that in recent years the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the mili-

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> constitutional authorization for *Congress* "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, cl. 14, and rely upon inference for our own authority to allow money damages.

Stanley, 107 S. Ct. at 3062 (footnote omitted).

In his dissent in *Johnson*, Justice Scalia found it "strange that Congress' 'obvious' intention to preclude *Feres* suits because of their effect on military discipline was discerned neither by the *Feres* Court nor by the Congress that enacted the FTCA (which felt it necessary expressly to exclude recovery for combat injuries)." 107 S. Ct. at 2073. Clearly, his disagreement with the majority lies in its interpretation of the FTCA, which he finds unambiguous in permitting suits by servicepersons for injuries arising from military negligence. Justice Scalia stated, "I do not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding) that Congress did not mean what it plainly said in the statute before us." *Id.* He concluded that "the line between FTCA suits alleging military negligence and those alleging civilian negligence has nothing to recommend it except that it would limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has bred." *Id.* at 2075.

tary activity from which it arose.[2] Although the doctrine itself as well as its recent expansion have been decried by various courts and commentators, *see* authorities cited in *Johnson*, 107 S. Ct. at 2074 (Scalia, J., dissenting), we are bound to observe the Court's clear directive on this issue. Indeed, we have recently found *Shearer* controlling in a case involving the beating death of an off-duty serviceman by three of his fellow enlistees, also free on weekend passes. *Satterfield v. United States*, 788 F.2d 395 (6th Cir. 1986) (applying both *Feres* and FTCA exception for intentional torts at 28 U.S.C. § 2860(h) to bar suit).

Plaintiffs in the case at bar attempt to distinguish *Shearer* by alleging that the allegation in their complaint as to negligent supervision is merely "alternative" and "collateral"; no military decision-making process is implicated because the relevant "decision" was made when the regulations allegedly prohibiting on-base consumption of alcohol were promulgated, and this suit challenges only the *failure* to follow those regulations; and military discipline would not be impaired because the tortfeasor, Lane, has already been court-martialed.[3] These attempted distinctions are unpersuasive. The district court found, and we agree,

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[2]As Justice Scalia observed in his dissent in *Johnson*, *Brooks* has neither been overruled nor even expressly disapproved by the Court. Nevertheless, it is obvious that, contrary to the Court assertion in *Brooks*, it has now been "persuaded" that the phrase "any claim" contained in the FTCA *does* mean "any claim but that of servicemen." *See Brooks*, 337 U.S. at 51. Although the *Shearer* Court attempted briefly to distinguish *Brooks*, 473 U.S. at 58, its rationale has clearly been significantly, if not fatally, undermined.

[3]At the time this case was briefed, the parties did not have the benefit of the Supreme Court's opinions in *Johnson* and *Stanley;* hence their reliance on *Feres* and *Shearer* as setting forth the totality of the law on this question. In fact, plaintiffs specifically

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that since Spradlin and Mauk were on active duty status at the time of the accident, the actions of their superiors and Lane were "command decisions." A challenge to these actions would require those superiors either in attendance at the party at which Lane became intoxicated or with knowledge of that gathering to testify about military decisions relating to the provision and/or consumption of alcohol on base as well as disciplinary policies for infractions of such rules. It would also result in judicial prying into the knowledge or lack thereof of any unauthorized practices and would involve second-guessing of military decisions and orders with respect to the operation of the installation. Furthermore, we specifically rejected a similar allegation of Army violation of its own internal regulations as grounds for avoiding the *Feres/Shearer* bar in *Satterfield*, concluding that that claim also impermissibly insinuates the civilian judiciary into military disciplinary decisions. 788 F.2d at 398.

Since we find no supportable basis for concluding that this suit will not "call[ ] into question basic choices about the discipline, supervision, and control of [servicemen]," *Shearer*, 473 U.S. at 58, the district court's dismissal for lack of subject-matter jurisdiction is AFFIRMED.

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cite the courts of appeals' opinions in both *Johnson* and *Stanley* (both subsequently reversed) in support of their position.

Plaintiffs also rely heavily on a factually similar case, *Johnson* v. *United States*, 704 F. 2d 1431 (9th Cir. 1983), in which the plaintiff was permitted to escape the *Feres* jurisdictional bar because the court found that his activity at the time of injury—being driven home by an intoxicated fellow serviceman following an off-duty party—was not "incident" to military service" as envisioned by *Feres*. However, since that case was decided prior to all of the Supreme Court's recent *Feres* decisions, we conclude that its rationale as well as its result are now suspect and should not be followed.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 86-0116-L(B)

DON H. MAJOR, Administrator of the Estate of Debra Lynn Spradlin, deceased - - - *Plaintiff*

v.

UNITED STATES OF AMERICA - - - - - - *Defendant*

—Consolidated With—

No. C 86-0363-L(B)

CHARLES L. MAUK - - - - - - - *Plaintiff*

v.

UNITED STATES OF AMERICA - - - - *Defendant*

MEMORANDUM—Entered October 27, 1986

These consolidated actions are before the Court on the motion of defendant to dismiss.

On March 17, 1983, on the Fort Campbell Military Reservation, Pvt. Debra Spradlin and Pvt. Charles Mauk, hereafter referred to as plaintiffs, were struck by an automobile driven by S/Sgt. William Lane. Mauk was seriously injured and Spradlin was killed. After exhausting administrative remedies, plaintiffs commenced these actions under the Federal Tort Claims Act (FTCA), Title 28 U.S.C. §§ 1346 (b) and 2671 *et seq.*

There is no serious dispute of material fact. The parties are agreed that plaintiffs, although off duty, were on active duty status, as was Lane. Lane had attended a party on the post and apparently he had consumed a considerable amount of alcohol and was driving to his home when he ran off the roadway striking plaintiffs.

The thrust of defendant's motion derives its impetus from *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153 (1950), and *United States v. Shearer*, —— U.S. ——, 105 S. Ct. 3039 (1985).

In *Feres* the Court traced the history of the FTCA and distinguished tort claims by military personnel for service-connected injuries from tort claims by non-military individuals against government agents or agencies. The Court concluded:

> "[T]hat the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." 340 U.S. at 146, 71 S.Ct. at 159.

Two terms ago the Supreme Court re-examined *Feres* in *United States* v. *Shearer, supra.* In *Shearer* plaintiff's decedent, a serviceman, had been kidnapped and murdered by another serviceman. In a two-part opinion Chief Justice Burger first treated the FTCA's exclusion of claims arising from assault and battery. He then addressed the broader question of the *Feres* doctrine and rejected the

holding of the Court of Appeals that because plaintiff's decedent was off duty and away from the base *Feres* was inapplicable.

The *Shearer* court determined that, "the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions (citation omitted) and whether the suit might impair essential military discipline (citation omitted)." —— U.S. at ——, 105 S.Ct. at 3043. After a review of the allegations of Shearer's complaint, the Court determined that to permit a suit challenging the actions of commanding officers would force the commanding officers to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions which go to the heart of professional military judgment.

In the case *sub judice*, plaintiffs' complaints challenge the conduct of Lane's superiors and fellow soldiers both in holding the party at which Lane became intoxicated and in allowing him to leave in that condition. Plaintiff's difficulty lies in the fact that, however unwise the conduct of Lane's associates, their actions were command decisions. For this Court to intervene in military affairs would be at the expense of military discipline and effectiveness. A trial would involve second-guessing military orders and would very likely require members of the Armed Services to testify in court as to each other's decisions, a situation condemned in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 77 S.Ct. 2054 (1977).

The Court has considered and rejects plaintiff's attempt to avoid *Feres* by arguing that the basis of their complaints is the failure of Army personnel to follow regulations relating to the provision and consumption of alcoholic beverages on a government reservation.

The *Feres* court rejected an "attempt to hale Army officials into court to account for their supervision and

discipline of [the tort feasor]." —— U.S. at ——, 105 S. Ct. at 3044. This Court is unable to find a distinction between *Shearer* and the action now before the Court.

The Court concludes that the teaching of *Feres* and *Shearer* dictate that defendant's motion to dismiss must be granted, and an appropriate order has been entered this 27th day of October, 1986.

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel

ORDER—Entered October 27, 1986

For the reasons set forth in the memorandum filed this date,

It Is Ordered that the motion of the defendant, United States of America, to dismiss the complaints of plaintiffs, Don H. Major, Administrator of the Estate of Debra Lynn Spradlin, deceased, and Charles L. Mauk, be and it hereby is granted and these actions be and they hereby are dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable order.

This 27th day of October, 1986.

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 86-0116 L-B

DON H. MAJOR, Administrator of the Estate of Debra Lynn Spradlin, deceased, - - *Plaintiff*,

v.

UNITED STATES OF AMERICA, - - - *Defendant.*

Comes now the Plaintiff, Don H. Major, Administrator of the Estate of Debra Lynn Spradlin, deceased, and for his Complaint, states as follows:

JURISDICTION AND VENUE

1. This is a civil action for damages pursuant to the Federal Tort Claims Act, 28 USC 2671 et seq., and jurisdiction is conferred on this Court under 28 USC 1346(b).

2. The Plaintiff resides in Louisville, Jefferson County, Kentucky, and venue of this action is properly laid in this Court pursuant to the provisions of 28 USC 1402(b).

THE PARTIES

3. On June 29, 1983, the Plaintiff, Don H. Major, qualified and was appointed Administrator of the Estate of Debra Lynn Spradlin, deceased, by Order entered that date in the Christian District Court, Probate Division, Hopkinsville, Kentucky, File No. 83-P0201.

4. The Plaintiff's decedent Debra Lynn Spradlin, at the time of her death, March 17, 1983, was a member of B Company, 501st Signal Battalion, United States Army,

assigned to the 101st Airborne Division, Fort Campbell, Kentucky. At the time of her death, Plaintiff's decedent Debra Lynn Spradlin was a resident of the Commonwealth of Kentucky.

5. At all times herein mentioned, the supervisors, commanders, and others, affiliated with the United States Army, or the United States Department of Defense, were employees of the United States of America. In doing or omitting to do all the things alleged herein, these said employees of the United States of America were acting within the scope of their respective employments, and with the permission and consent of the Defendant United States of America.

FACTS RELATING TO THE CLAIM

6. On March 17, 1983, at approximately 10:20 P.M., local time, on Tennessee Avenue near 18th Street on the Fort Campbell Military Reservation, the Plaintiff's decedent was struck and killed by a vehicle operated by William Brian Lane, an employee of the United States Army, assigned to the 372nd Transportation Company, Fort Campbell, Kentucky.

7. The said Lane had become intoxicated to the extent of extreme physical and mental disability and impairment at an official "party" or gathering of personnel of the 372nd Transportation Company held March 17, 1983 beginning at approximately 5:00 P.M., local time, at the Barracks of the 372nd Transportation Company [Building No. 3725] located east of Tennessee Avenue and north of 49th Street on the Fort Campbell Military Reservation.

8. In connection with this "party," large amounts of intoxicating beverages were purchased by, at the direction of, and with the knowledge of, supervisory command personnel of the 372nd Transportation Company, and made available to members of the 372nd Transportation Com-

pany either as an officially sanctioned act, or under color of an official act, and in violation of existing, valid regulations of the United States Army [at its various command levels], of the United States Department of Defense, and of other cognizant agencies and officials of the Defendant United States.

9. These said supervisory command personnel knew or should have known (1) that the persons to whom these intoxicants were made available were extremely fatigued, having just returned from a long, arduous field exercise; (2) that the consumption of the quantity of alcoholic beverages provided or made available would seriously impair those persons consuming them, including Lane; (3) that Lane and others consuming these alcoholic beverages had available, and would operate motor vehicles to leave the scene of the "party"; and (4) that all these circumstances created a certain risk, or likelihood of serious injury or death to various persons including the Plaintiff's decedent.

10. At approximately 10:00 P.M., local time, on March 17, 1983, Lane left Building 3725 and went to his privately-owned vehicle, located in a parking lot adjacent to Building 3725. Lane got into this vehicle and drove off down Tennessee Avenue. Lane was observed leaving Building 3725 and going to the parking lot for the purpose of entering and operating his vehicle by a senior non-commissioned officer and supervisor of the 372nd Transportation Company, SFC [E-7] John Francis Brown. Brown, and other employees of the Defendant, knew of Lane's impaired condition and failed to prevent Lane from operating Lane's vehicle.

11. A mixture of rain and snow was falling at the time, and Brown, and other employees of the Defendant, knew that these weather conditions, including reduced visibility and slick roads, would further impair Lane's ability to operate his vehicle in a safe manner.

12. After leaving the parking lot at Building 3725, Lane drove his vehicle south on Tennessee Avenue. At this time, Lane was intoxicated and extremely impaired and was operating his vehicle without headlights and at an excessive rate of speed.

13. At approximately 2220 hours, just north of the intersection of 18th Street, Lane's vehicle left the right hand [west] side of the roadway of Tennessee Avenue, at high speed, out of control, and proceeded across the shoulder of the road and struck (1) a Honda motorcycle which was legally parked well off the roadway; (2) the person of Charles L. Mauk, E-4, a member of Company B, 501st Signal Battalion; and (3) the person of the decedent Spradlin. At the time of the collision the motorcycle was clearly visible from the roadway, and both Mauk and Spradlin were sitting on the motorcycle.

14. As a result of being struck by Lane's vehicle, Spradlin received fatal injuries which resulted in her death approximately 90 minutes later at the Blanchfield Army Hospital, Fort Campbell, Kentucky.

15. The operative and proximate cause of the accident which resulted in the death of Plaintiff's decedent was the intoxication of the said Lane which was induced and which occurred at an official, quasi-official, or officially sanctioned gathering or function March 17, 1983 conducted or directed by, or acquiesced in, and known to SFC John Francis Brown, 2nd Lt. Alfred Henson, and other officers and non-commissioned officers of the 101st Airborne Division presently unknown to the claimant [but known to the United States].

16. The availability, provision, and consumption of alcoholic intoxicating beverages under the cited circumstances was in violation of existing, valid laws and regulations applicable to these said employees, and to their conduct in the premises. In addition or in the alternative, laws

and regulations applicable to such conduct were wrongfully or negligently implemented and administered by officers and non-commissioned officers of the 101st Airborne Division under circumstances which they knew, or should have known would result in serious injury or death to civilian or military personnel on or off the Fort Campbell Military Reservation, including Plaintiff's decedent.

17. Officers and non-commissioned officers of the 101st Airborne Division, presently unknown to claimant [but known to the United States], violated existing, valid laws and regulations or, in addition or in the alternative, wrongfully and negligently implemented and administered applicable laws and regulations when they negligently and wrongfully failed to supervise and control subordinate employees who were responsible for the wrongful conduct involved in the "party" held March 17, 1983 at Building 3725.

18. The commanders and cognizant responsible subordinate personnel of the following U. S. Army commands violated existing, valid laws and regulations and, in addition or in the alternative, negligently and wrongfully failed to provide proper and adequate training, and otherwise failed to provide for the proper implementation of applicable laws and regulations pertaining to the distribution and consumption of alcoholic intoxicants to U. S. Army personnel, generally, and under particular circumstances where serious injury or death is, or was likely to result from the distribution or consumption of such intoxicants:

XVIII Airborne Corps
101st Airborne Division (Air Assault)
Headquarters 101st Airborne Division (Air Assault) and Fort Campbell, Kentucky
Eagle Support Brigade, 101st Airborne Division
29th Transportation Bn, 101st Airborne Division
372nd Transportation Co., 101st Airborne Division

19. In addition or in the alternative, those commanders and persons as set forth in paragraph 18, above, and other employees of the United States, or of the United States Army, violated existing, valid regulations and, in addition or in the alternative, wrongfully and negligently failed to administer and implement policies, orders, and regulations of the President of the United States, the Secretary of Defense, and the Secretary of the Army, relating to the distribution and consumption of alcoholic intoxicants, the purpose of the said policies, orders, and regulations being to prevent harm resulting from the distribution or consumption of such intoxicants.

20. In addition to, and in the aggravation of their conduct in connection with the "party" at Building 3725 on March 17, 1983, SFC John Francis Brown and other employees of the United States or of the United States Army presently unknown to the claimant [but known to the United States] (a) knew that Lane had become intoxicated, impaired, and disabled from safely operating a motor vehicle on the evening or night of March 17, 1983; and (b) knew that Lane intended to operate a motor vehicle at that time; (c) were in a position, had the authority, had numerous opportunities, and in fact had an affirmative duty under existing law and regulations to prevent Lane from operating a motor vehicle in the intoxicated condition in which they knew him to be; and (d) negligently and wrongfully failed to prevent Lane from operating a motor vehicle at that time.

SUPPLEMENTAL ALLEGATIONS RELATING TO THE MILITARY STATUS OF PLAINTIFF'S DECEDENT

21. At the time of the accident, which resulted in her death, March 17, 1983, the Plaintiff's decedent was not engaged in any activity incident to her military service, and

this cause of action is not barred under the doctrine of *Feres* v. *United States*, 340 U. S. 135 (1950).

22. Even though the accident on March 17, 1983 which resulted in the death of Plaintiff's decedent occurred on a United States Army military base, the location of the accident, on the base, was on or near a roadway which was accessible to, and routinely used by military and non-military personnel alike; and thus the said roadway had the character of a public highway.

23. The chain of individual and collective wrongful acts and omissions on the part of employees of the United States and the United States Army related herein, which proximately caused the death of Plaintiff's decedent, were such that the same literally produced "an accident looking for a place to happen." The likelihood that Lane would injure or kill someone—himself or others—was so strong, that the accident which did occur, could have occurred anywhere—on or off Post. That the accident and resulting death of Plaintiff's decedent occurred where it did was essentially fortuitous and had nothing whatsoever to do with her military status.

24. At the time of her death, Plaintiff's decedent was off-duty and was not engaging in any activity even remotely connected with her military status or service, and her presence on the post at this time had nothing whatsoever to do with her military service.

25. At the time of her death, Plaintiff's decedent was not taking advantage of any privilege or benefit incident to military service.

26. The activities of Plaintiff's decedent at the time of her death were not of a character which would impact the integrity of military discipline if litigated through the judicial process.

27. Neither the Plaintiff nor the Plaintiff's decedent is, or was eligible to assert any claim under the Federal Employees' Compensation Act, 5 U.S.C. 8101 et seq.

DAMAGES

28. By reason of the wrongful acts and omissions of employees of the United States and of the United States Army which resulted in the death of the Plaintiff's decedent, Debra Lynn Spradlin, all as alleged and set forth herein, the Plaintiff is entitled to recover from the Defendant an amount which will fairly compensate the Estate of Debra Lynn Spradlin, and her heirs at law and survivors, for the economic loss of the pecuniary value of the life of the Plaintiff's decedent, an amount the Plaintiff herein asserts to be no less than $1,101,993.00.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

29. On February 22, 1985, Plaintiff filed a claim for administrative settlement with the Staff Judge Advocate, Headquarters, 101st Airborne Division and Fort Campbell, Fort Campbell, Kentucky, pursuant to 28 USC 2401(b).

30. On August 14, 1985, Plaintiff's claim was finally denied by the United States Army in writing.

WHEREFORE, the Plaintiff prays and demands:

1. Judgment against the Defendant in the amount of $1,101,993.00; and

2. That he recover his costs herein expended; and

3. That he be awarded all other relief to which he is entitled, and which to the Court may seem just and proper.

(s) William T. Warner

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Counsel for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Civil Action No. NA 86-42-C

CHARLES L. MAUK - - - - - - - *Plaintiff,*

v.

UNITED STATES OF AMERICA, - - - - *Defendant.*

COMPLAINT

Comes now the plaintiff, Charles L. Mauk, and for his Complaint, states as follows:

JURISDICTION AND VENUE

1. This is a civil action for damages pursuant to the Federal Tort Claims Act, 28 USC 2671 et seq., and jurisdiction is conferred on this Court under 28 USC 1346(b).

2. The Plaintiff resides in Jeffersonville, Clark County, Indiana, and venue of this action is properly laid in this Court pursuant to the provisions of 28 USC 1402(b).

THE PARTIES

3. At all times herein mentioned, the Plaintiff was a member of B Company, 501st Signal Battalion, United States Army, assigned to the 101st Airborne Division, Fort Campbell, Kentucky.

4. At all times herein mentioned, the supervisors, commanders, and others, affiliated with the United States Army, or the United States Department of Defense, were employees of the United States of America. In doing or

omitting to do all the things alleged herein, these said employees of the United States of America were acting within the scope of their respective employments, and with the permission and consent of the Defendant United States of America.

FACTS RELATING TO THE CLAIM

5. On March 17, 1983, at approximately 10:20 P.M., local time, on Tennessee Avenue near 18th Street on the Fort Campbell Military Reservation, the Plaintiff was struck and seriously and permanently injured by a vehicle operated by William Brian Lane, an employee of the United States Army, assigned to the 372nd Transportation Company, Fort Campbell, Kentucky.

6. The said Lane had become intoxicated to the extent of extreme physical and mental disability and impairment at an official "party" or gathering of personnel of the 372nd Transportation Company held March 17, 1983 beginning at approximately 5:00 P.M., local time, at the Barracks of the 372nd Transportation Company [Building No. 3725] located east of Tennessee Avenue and north of 49th Street on the Fort Campbell Military Reservation.

7. In connection with this "party," large amounts of intoxicating beverages were purchased by, at the direction of, and with the knowledge of, supervisory command personnel of the 372nd Transportation Company, and made available to members of the 372nd Transportation Company either as an officially sanctioned act, or under color of an official act, and in violation of existing, valid regulations of the United States Army [at its various command levels], of the United States Department of Defense, and of other cognizant agencies and officials of the Defendant United States.

8. These said supervisory command personnel knew or should have known (1) that the persons to whom these in-

toxicants were made available were extremely fatigued, having just returned from a long, arduous field exercise; (2) that the consumption of the quantity of alcoholic beverages provided or made available would seriously impair those persons consuming them, including Lane; (3) that Lane and others consuming these alcoholic beverages had available, and would operate motor vehicles to leave the scene of the "party"; and (4) that all these circumstances created a certain risk, or likelihood of serious injury or death to various persons including the Plaintiff.

9. At approximately 10:00 P.M., local time, on March 17, 1983, Lane left Building 3725 and went to his privately-owned vehicle, located in a parking lot adjacent to Building 3725. Lane got into this vehicle and drove off down Tennessee Avenue. Lane was observed leaving Building 3725 and going to the parking lot for the purpose of entering and operating his vehicle by a senior non-commissioned officer and supervisor of the 372nd Transportation Company, SFC [E-7] John Francis Brown. Brown, and other employees of the Defendant, knew of Lane's impaired condition and failed to prevent Lane from operating Lane's vehicle.

10. A mixture of rain and snow was falling at the time, and Brown, and other employees of the Defendant, knew that these weather conditions, including reduced visibility and slick roads, would further impair Lane's ability to operate his vehicle in a safe manner.

11. After leaving the parking lot at Building 3725, Lane drove his vehicle south on Tennessee Avenue. At this time, Lane was intoxicated and extremely impaired and was operating his vehicle without headlights and at an excessive rate of speed.

12. At approximately 2220 hours, just north of the intersection of 18th Street, Lane's vehicle left the right hand [west] side of the roadway of Tennessee Avenue, at high speed, out of control, and proceeded across the shoulder

of the road and struck (1) a Honda motorcycle which was legally parked well off the roadway; (2) the person of Debra Lynn Spradlin, E-3, a member of Company B, 501st Signal Battalion; and (3) the person of the Plaintiff Mauk. At the time of the collision the motorcycle was clearly visible from the roadway, and both Mauk and Spradlin were sitting on the motorcycle.

13. As a result of being struck by Lane's vehicle, Mauk received serious and permanent injuries as more particularly alleged and related herein.

14. The operative and proximate cause of the accident which resulted in the injuries to Plaintiff was the intoxication of the said Lane which was induced and which occurred at an official, quasi-official, or officially sanctioned gathering or function March 17, 1983 conducted or directed by, or acquiesced in, and known to SFC John Francis Brown, 2nd Lt. Alfred Henson, and other officers and non-commissioned officers of the 101st Airborne Division presently unknown to the Plaintiff [but known to the United States].

15. The availability, provision, and consumption of alcoholic intoxicating beverages under the cited circumstances was in violation of existing, valid laws and regulations applicable to these said employees, and to their conduct in the premises. In addition or in the alternative, laws and regulations applicable to such conduct were wrongfully or negligently implemented and administered by officers and non-commissioned officers of the 101st Airborne Division under circumstances which they knew, or should have known would result in serious injury or death to civilian or military personnel on or off the Fort Campbell Military Reservation, including Plaintiff.

16. Officers and non-commissioned officers of the 101st Airborne Division, presently unknown to Plaintiff [but known to the United States], violated existing, valid laws and regulations or, in addition or in the alternative, wrong-

fully and negligently implemented and administered applicable laws and regulations when they negligently and wrongfully failed to supervise and control subordinate employees who were responsible for the wrongful conduct involved in the "party" held March 17, 1983 at Building 3725.

17. The commanders and cognizant responsible subordinate personnel of the following U. S. Army commands violated existing, valid laws and regulations and, in addition or in the alternative, negligently and wrongfully failed to provide proper and adequate training, and otherwise failed to provide for the proper implementation of applicable laws and regulations pertaining to the distribution and consumption of alcoholic intoxicants to U. S. Army personnel, generally, and under particular circumstances where serious injury or death is, or was likely to result from the distribution or consumption of such intoxicants:

XVIII Airborne Corps

101st Airborne Division (Air Assault)

Headquarters 101st Airborne Division (Air Assault) and Fort Campbell, Kentucky

Eagle Support Brigade, 101st Airborne Division

29th Transportation Bn, 101st Airborne Division

372nd Transportation Co., 101st Airborne Division

18. In addition or in the alternative, those commanders and persons as set forth in paragraph 17, above, and other employees of the United States, or of the United States Army, violated existing, valid regulations and, in addition or in the alternative, wrongfully and negligently failed to administer and implement policies, orders, and regulations of the President of the United States, the Secretary of Defense, and the Secretary of the Army, relating to the distribution and consumption of alcoholic intoxicants, the purpose of the said policies, orders, and regulations being

to prevent harm resulting from the distribution or consumption of such intoxicants.

19. In addition to, and in aggravation of their conduct in connection with the "party" at Building 3725 on March 17, 1983, SFC John Francis Brown and other employees of the United States or of the United States Army presently unknown to the Plaintiff [but known to the United States] (a) knew that Lane had become intoxicated, impaired, and disabled from safely operating a motor vehicle on the evening or night of March 17, 1983; and (b) knew that Lane intended to operate a motor vehicle at that time; (c) were in a position, had the authority, had numerous opportunities, and in fact had an affirmative duty under existing law and regulations to prevent Lane from operating a motor vehicle in the intoxicated condition in which they knew him to be; and (d) negligently and wrongfully failed to prevent Lane from operating a motor vehicle at that time.

SUPPLEMENTAL ALLEGATIONS RELATING TO THE MILITARY STATUS OF PLAINTIFF

20. At the time of the accident which resulted in the injuries to him, March 17, 1983, the Plaintiff was not engaged in any activity incident to his military service, and this cause of action is not barred under the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950).

21. Even though the accident on March 17, 1983 which resulted in the injuries to Plaintiff occurred on a United States Army military base, the location of the accident, on the base, was on or near a roadway which was accessible to, and routinely used by military and non-military personnel alike; and thus the said roadway had the character of a public highway.

22. The chain of individual and collective wrongful acts and omissions on the part of employees of the United

States and the United States Army related herein, which proximately caused the injuries to Plaintiff, were such that the same literally produced "an accident looking for a place to happen." The likelihood that Lane would injure or kill someone—himself or others—was so strong, that the accident which did occur, could have occurred anywhere—on or off Post. That the accident and resulting injuries to Plaintiff occurred where it did was essentially fortuitous and had nothing whatsoever to do with his military status.

23. At the time of the accident March 17, 1983, Plaintiff was off-duty and was not engaging in any activity even remotely connected with his military status or service, and his presence on the post at this time had nothing whatsoever to do with his military service.

24. At the time of the injury to him, Plaintiff was not taking advantage of any privilege or benefit incident to military service.

25. The activities of Plaintiff at the time of the injury to him were not of a character which would impact the integrity of military discipline if litigated through the judicial process.

26. The Plaintiff is not eligible to assert any claim under the Federal Employees' Compensation Act, 5 U.S.C. 8101 et seq.

DAMAGES

27. By reason of the wrongful acts and omissions of employees of the United States and of the United States Army which resulted in the injuries to Plaintiff Charles L. Mauk, all as alleged and set forth herein, the Plaintiff has incurred medical expenses and will incur medical expenses in the future; has suffered, and will suffer pain in the future, as well as emotional trauma and distress, and psychological maladjustment; has suffered permanent facial scarring; and has suffered permanent impairment of future earning

capacity. Plaintiff is thereby entitled to recover from the Defendant an amount which will fairly compensate him in the premises, an amount the Plaintiff herein asserts to be no less than $1,429,234.00.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

29. On March 14, 1985, Plaintiff filed a claim for administrative settlement with the Staff Judge Advocate, Headquarters, 101st Airborne Division and Fort Campbell, Fort Campbell, Kentucky, pursuant to 28 USC 2401(b).

30. On August 14, 1985, Plaintiff's claim was finally denied by the United States Army in writing.

WHEREFORE, the Plaintiff prays and demands:

1. Judgment against the Defendant in the amount of $1,429,234.00; and

2. That he recover his costs herein expended; and

3. That he be accorded all other relief to which he is entitled, and which to the Court may seem just and proper.

(s) William T. Warner

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EXCERPTS FROM TITLE 28, UNITED STATES CODE

§ 1346. United States as defendant

(a) . . .

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the mili-

tary or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the

case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

SUPREME COURT, U.S.
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No. 87-1541

In the Supreme Court of the United States

OCTOBER TERM, 1987

DON H. MAJOR, ADMINISTRATOR OF THE ESTATE OF DEBRA LYNN SPRADLIN, DECEASED, AND CHARLES L. MAUK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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6 pp

TABLE OF AUTHORITIES

Page

Cases:

Feres v. *United States*, 340 U.S. 135 (1950) 1, 4
Gilardy v. *United States*, cert. denied, No. 87-670 (Jan. 25, 1988) 4
United States v. *Johnson*, No. 85-2039 (May 18, 1987) ... 4
United States v. *Shearer*, 473 U.S. 52 (1985) 2, 3

Statutes:

Federal Tort Claims Act:

28 U.S.C. 1346(b) 1
28 U.S.C. 2671 *et seq.* 1

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the courts below misapplied *Feres* v. *United States*, 340 U.S. 135 (1950), in dismissing their damage suits and that *Feres* should be overruled.

1. Private Debra Spradlin was killed and Private Charles Mauk was severely injured when the motorcycle on which they were seated was struck by an automobile driven by William Lane, a non-commissioned Army officer. Spradlin and Mauk were parked off the road on the Fort Campbell Military Reservation at the time of the accident; they were on active duty status, but off duty. Lane had been drinking at a party on the post and was on his way home when his vehicle ran off the road and hit the motorcycle. Pet. App. 2a, 11a.

Petitioners brought suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages from the United States. They alleged that Army officers "negligently and wrongfully failed to supervise

and control subordinate employees who were responsible for the wrongful conduct involved in the 'party' " (Pet. App. 18a, 27a). They added that "those commanders * * * wrongfully and negligently failed to administer and implement policies, orders, and regulations of the President of the United States, the Secretary of Defense, and the Secretary of the Army, relating to the distribution and consumption of alcoholic intoxicants" (*id.* at 19a, 27a).

The district court granted the government's motion to dismiss the complaints (Pet. App. 10a-13a). The court noted that "plaintiffs' complaints challenge the conduct of Lane's superiors and fellow soldiers both in holding the party at which Lane became intoxicated and in allowing him to leave in that condition" (*id.* at 12a). It concluded, relying on *United States* v. *Shearer*, 473 U.S. 52 (1985), that the suits are barred by *Feres* because "[a] trial would involve second-guessing military orders and would very likely require members of the Armed Services to testify in court as to each other's decisions" (Pet. App. 12a).

The court of appeals affirmed (Pet. App. 1a-9a). It noted that petitioners "attempt to distinguish *Shearer* by alleging that the allegation in their complaint as to negligent supervision is merely 'alternative' and 'collateral'; [petitioners contend that] no military decision-making process is implicated because the relevant 'decision' was made when the regulations allegedly prohibiting on-base consumption of alcohol were promulgated, and this suit challenges only the *failure* to follow those regulations" (*id.* at 8a (emphasis in original)). The court found the "attempted distinctions * * * unpersuasive" since a trial "would require those superiors either in attendance at the party at which Lane became intoxicated or with knowledge of that gathering to testify about military decisions relating to the provision and/or consumption of alcohol

on base as well as disciplinary policies for infractions of such rules" (*id.* at 8a, 9a).

2. The decision below is correct and further review is not warranted. Petitioners acknowledge that their "allegations as to negligent supervision, standing alone, would be questionable" (Pet. 12 n.14). Indeed, negligent supervision claims are plainly barred by *Shearer*, which held that the plaintiff's "attempt to hale Army officials into court to account for their supervision and discipline of [an Army private] must fail" (473 U.S. at 59). Contrary to petitioners, it makes no difference that they allege that Army officers failed to enforce regulations relating to the consumption of alcohol. Their claims remain negligent supervision claims even if the allegedly negligent supervision violated regulations, and requiring military officers to testify in civilian court as to their compliance with governing regulations is just as intrusive (if not more so) as asking them otherwise to account for their supervision of subordinates. As the court of appeals concluded, it is likely that a trial of petitioners' suit would " 'call[] into question basic choices about the discipline, supervision, and control of [servicemen].' " Pet. App. 9a (quoting *Shearer*, 473 U.S. at 58 (footnote omitted)). In any event, suits where the issue is whether military officers complied with regulations in supervising subordinates are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (473 U.S. at 59 (emphasis in original)). Petitioners' claims are therefore barred.

Petitioners deny that "the existence of military 'no-fault' benefits creates yet another reason to deny Petitioners any remedy under the FTCA" (Pet. 16). However, this Court held last Term that "the existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related

injuries." *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), slip op. 8. Moreover, the provision of veterans' benefits responds to petitioners' complaint that Lane "could very well have struck * * * a *non-military* person" and that *Feres* would not bar the action in that event (Pet. 16 (emphasis in original)). If Lane had struck a civilian, the injured person, unlike petitioners, would not have been eligible for no-fault veterans' benefits. While, unlike petitioners, a civilian would not be barred by *Feres* from suing the government, a civilian would have great difficulty recovering from the government under the facts of this case since Lane was not on government business or driving a government car when he ran off the road.

Petitioners also suggest that "the time has come to * * * repeal *Feres*" (Pet. 10). However, *Feres* was reaffirmed last Term in *Johnson*. This Term, the petitioner in *Gilardy* v. *United States* suggested overruling *Feres* and the Court denied the petition (No. 87-670 (Jan. 25, 1988)). There is no reason to revisit that question now. As the Court stated in *Feres*, "Congress possesses a ready remedy" (340 U.S. at 138) if it disagrees with this Court's construction of the FTCA, but it has not taken action to overrule *Feres* legislatively in the 38 years since that decision was announced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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